Supreme Court, U.S.
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No. 01-27

In The

# Supreme Court of the United States

CHARLES SULLIVAN, individually, and d/b/a SULLIVAN MACHINE & TOOL COMPANY, and JOSEPHINE SULLIVAN,

*Petitioners,*

vs.

BAYLESS E. BILES, JR., and WILKINS, BANKSTER, BILES & WYNNE, P.A.; RAY MORGAN THOMPSON and ARMBRECHT, JACKSON, DeMOUY, CROWE, HOLMES & REEVES; MAZAK CORPORATION,

*Respondents.*

**On Petition For Writ Of Certiorari To The Supreme Court Of Alabama**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## DISCLOSURE STATEMENT

Respondent Wilkins, Bankster, Biles & Wynne, P.A., is a law firm formed as a professional association under Alabama law, and there are no parent corporations nor any publicly held company that owns ten percent or more of the professional association.

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## JURISDICTIONAL STATEMENT

This Honorable Court should decline jurisdiction because the Petitioners have not presented an important question of federal law that was timely presented to and decided by the Supreme Court of Alabama, nor have Petitioners presented to the Court a decision on a federal question that conflicts with the relevant decisions of this Court.

## STATEMENT OF THE CASE

Charles and Josephine Sullivan, d/b/a Sullivan Machine & Tool Company, filed a civil action in the Circuit Court of Baldwin County, Alabama, alleging breach of contract and other claims against Mazak Corporation concerning a milling machine manufactured by Mazak and purchased by Sullivan.[1] Sullivan Machine & Tool Company is a sole proprietorship owned solely by Charles Sullivan.[2]

Mazak Corporation filed a counterclaim in the Baldwin County action seeking payment for the vertical milling machine. The case proceeded to trial in March of 1993. The jury returned a verdict against Sullivan on Sullivan's claims against Mazak and in favor of Mazak on its counterclaim. No judgment was rendered against Josephine Sullivan, as she was dismissed by stipulation of

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[1] This Baldwin County lawsuit is referred to at times as the "Baldwin County action."

[2] Charles Sullivan and Sullivan Machine & Tool Company are referred to as "Sullivan."

the parties before the case was submitted to the jury. (C 190-191, 199-200, 221-223).

This dispute arises out of a question asked by Baldwin County Circuit Judge Charles Partin during proceedings to select a jury on March 15, 1993, and the answer given by attorney Bayless E. Biles in open court. Mazak Corporation was represented in the Baldwin County action by the law firm of Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves of Mobile, Alabama. Primary counsel for Mazak was Ray Thompson. One week prior to trial, attorney Ray Thompson contacted attorney Bayless Biles, a Baldwin County attorney, and requested that Mr. Biles serve as a jury consultant to advise Mr. Thompson in the selection of a jury. Attorney Biles was paid a flat fee for services to attorney Thompson, and Mr. Biles sole involvement in the Baldwin County action was as a jury consultant to the attorneys for Mazak. Mr. Biles never sat at the same table as counsel for Mazak Corporation at any time. There is no evidence that any juror was ever aware that Mr. Biles played any role as a jury consultant to the attorneys for Mazak Corporation until after the verdict was rendered. Mr. Biles did not even sit with defendant Mazak Corporation's attorneys during the process of jury selection, and did not meet and confer with those counsel in the presence of the jury; rather, Mr. Biles met with counsel for Mazak only outside the presence of the jury (in a separate room outside the courtroom) where Mr. Biles and Mazak attorneys went over the jury panel list and discussed potential jurors. (C 145, 157-159, 161-163, 171-175). Mr. Biles did not participate in the voir dire questioning nor in the actual striking of any potential jurors; Mr. Biles' role was limited to consulting with

Mazak's attorney outside the presence of the jury. (C 145-146, 165-166, 171-175).

After the trial court conducted a voir dire examination of prospective jurors and when Sullivan's counsel was questioning prospective jurors, the trial court asked Mr. Biles (who was then in the courtroom near the judge) whether he was connected with the case, and Mr. Biles answered in the negative. Since his only involvement was the limited role of jury consultant to counsel for Mazak and he had no stake or interest in the case, Mr. Biles did not believe he was an attorney in the case. Both Mr. Biles and attorney Thompson understood the question from the court to be an inquiry as to whether Mr. Biles was an attorney in the case, and both lawyers believed Mr. Biles was not an attorney in the case. (C 164-169, 140-141, 145-147). In any event, the court was not informed of Mr. Biles' role as a jury consultant to Mazak's attorney.

On a couple of occasions during the course of the trial, when Mr. Biles was otherwise in the Baldwin County Courthouse, Mr. Biles observed a few minutes of the trial but never sat at Mazak's counsel's table. (C 135-136, 171-172). Although Mr. Biles' brother-in-law, Mr. Jones, served on the jury, Mr. Biles had no contact with Mr. Jones during the course of the trial and Mr. Biles first spoke with Mr. Jones one week after the verdict. (C 137-138, 146).

Sullivan filed a motion for relief from judgment of the Baldwin County action, pursuant to Rule 60(b)(6) of the *Alabama Rules of Civil Procedure*, in April of 1994. (C 670-687). The basis for this motion was Sullivan's claim that attorney Bayless Biles and the attorneys for Mazak

wrongfully concealed from the trial court and from Sullivan a material fact (that Mr. Biles was a consultant to Mazak's attorneys) during the proceedings in the Baldwin County action. In Sullivan's prayer for relief in this Rule 60(b) motion, Sullivan specifically requested that the Circuit Court enter an order "granting a new trial in this case for all of the reasons described in this motion." Sullivan also expressly sought "such other further and different relief as to which he may be entitled, premises considered." (C 687).

In written pleadings in support of the motion for relief from judgment, Sullivan repeatedly alleged that there had been a "concealment" during the Baldwin County action by Biles and Mazak's attorneys. (C 677-678, 279-288). Sullivan's motion was heard in a special hearing in the Circuit Court of Baldwin County on April 27, 1994. Sullivan argued at the hearing that Biles and Mazak's attorneys concealed material facts from the trial court and Sullivan. After considering all the evidence presented, which included the sworn deposition testimony of Mr. Biles, and arguments advanced, Circuit Judge Partin issued a written order on May 9, 1994, which granted Sullivan a new trial, but did not grant any further or other relief, such as sanctions or the imposition of attorney's fees or costs, because the trial court found there had been no attorney misconduct by Biles or Thompson. Judge Partin found that Mr. Biles answered the court's question in the negative because there was a "misunderstanding" as to the nature of the court's inquiry, and the court expressly found there was no wrongdoing by the attorneys involved. (C 972-973). "The court expressly finds that Mr. Biles had no intention to mislead the court

and the court determines that there was no improper conduct on the part of Mr. Biles." (C 972).

The current action was instituted by Charles and Josephine Sullivan, d/b/a Sullivan Machine & Tool Company, filing a civil complaint in the Circuit Court of Mobile County in 1995 in which Sullivan alleged fraud, deceit, conspiracy, and other causes[3]. It is unclear to respondent why Josephine Sullivan is listed as a petitioner when Sullivan agreed, in the Circuit Court of Mobile County, that Josephine Sullivan had no standing to maintain any claims. (C 373).

Mr. Biles and his law firm and Mr. Thompson and his law firm filed motions for summary judgment in the Mobile County action raising numerous state law grounds in support of their motions, including, inter alia, collateral estoppel, res judicata, the absence of a private cause of action under Alabama law for alleged attorney misconduct during adversarial proceedings, absolute immunity under Alabama law from civil liability for statements made in open court and related to a judicial proceeding, the absence of any tort law duty owed by the defendants to Sullivan, the total absence of any damages since Sullivan got a new trial in the Baldwin County action and lost again. (C 94-113). The judge in the Mobile County action granted Mr. Thompson and his law firm's motion for summary judgment but denied the motion for summary judgment by Mr. Biles and his law firm. (C 759). Sullivan appealed to the Supreme Court of Alabama from

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[3] This civil action is referred to as the "Mobile County action."

the summary judgment entered in favor of defendant Thompson and his law firm, and Mr. Biles and his law firm appealed from the trial court's denial of summary judgment.

Although Sullivan filed a brief in opposition to the motions for summary judgment in the Mobile County action (C 350-375), Sullivan never asserted, at the trial court level, that application of Alabama's law of collateral estoppel as a basis for summary judgment against Sullivan would violate the Due Process Clause or any other provision in the Constitution of the United States. Similarly, Sullivan made no such arguments in the Supreme Court of Alabama prior to the August 11, 2000, decision.

The very first issue raised in the Brief of Appellant of Mr. Biles, in the Supreme Court of Alabama, was whether collateral estoppel or res judicata barred Sullivan's claims in the Mobile County action. Even though Sullivan filed several briefs in the Supreme Court of Alabama, before it issued its August 11, 2000, decision, Sullivan never asserted that application of collateral estoppel to the fact findings of Judge Partin in the Baldwin County action would violate Sullivan's rights under the Constitution of the United States.[4]

The first time Sullivan raised any constitutional issue as to the application of collateral estoppel in this case was in Sullivan's application for rehearing in the Supreme

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[4] Sullivan actually filed at least three briefs on May 19, 1999, July 6, 1999, and June 24, 1999 in the consolidated appeals, before the decision by the Supreme Court of Alabama, but did not assert in any of these briefs that application of collateral estoppel would violate the Due Process Clause.

Court of Alabama. Sullivan's application for rehearing was denied on March 30, 2001, without any further opinion.

## SUMMARY OF ARGUMENT

The decision of the Alabama Supreme Court in this case rests solely on state law grounds. There is no question arising under any federal statute or provision of the Constitution of the United States which has been properly presented or decided in the courts below. Even if the alleged federal issue had been timely raised and actually decided in the Alabama Supreme Court, there would be no basis for review because there is no important federal question involved.

## REASONS FOR DENYING THE WRIT

### I. NO FEDERAL ISSUE WAS TIMELY PRESENTED IN THE COURT BELOW NOR DECIDED BY THE ALABAMA COURT, AND THE DECISION BELOW RESTS ON INDEPENDENT STATE LAW GROUNDS.

Sullivan did not raise any constitutional challenges to giving collateral estoppel preclusive effect to Judge Partin's fact findings in Sullivan's opposition to the motions for summary judgment in the Mobile County action. Sullivan did not raise any such constitutional challenges in the several briefs Sullivan filed in the Supreme Court of Alabama before it issued the decision. The Alabama Supreme Court held that Sullivan's claims

in the Mobile County action were barred by application of collateral estoppel to the findings of fact made by Judge Partin in his May 9, 1994, order. Sullivan did not raise any constitutional objection to the application of collateral estoppel until Sullivan's application for rehearing. Sullivan's untimely constitutional objection to collateral estoppel comprised only a small portion of Sullivan's sixty-five page application for rehearing. The rehearing application was denied without further opinion, so there is no decision on Sullivan's untimely raised federal issue.

Constitutional issues or questions not presented in the trial court normally are not considered on appeal by the Alabama Supreme Court. *Cooley v. Knapp*, 607 So.2d 146 (Ala. 1992); *Alabama Power Company v. Turner*, 575 So.2d 551, 553 (Ala. 1991); *Central Alabama Electric Cooperative v. Tapley*, 546 So.2d 371, 375 (Ala. 1989); *United Service Automobile Association v. Wade*, 544 So.2d 906, 917 (Ala. 1989); *HealthAmerica v. Minton*, 551 So.2d 235, 247 (Ala. 1989); *Marion v. Hall*, 429 So.2d 937, 939 (Ala. 1983); *Cooper v. Green*, 359 So.2d 377 (Ala. 1978). The Alabama Court also does not consider issues raised for the first time in an application for rehearing. *Kirkland v. Kirkland*, 281 Ala. 42, 49, 198 So.2d 771 (1967); *Austin v. Pepperman*, 278 Ala. 551, 572, 179 So.2d 299 (1965). There is no indication the Alabama Court departed from these rules to even consider any federal issues Sullivan may have raised on rehearing.

As was observed in *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988), the Court normally declines to exercise certiorari jurisdiction under such circumstances:

> As this Court stated in *Webb v. Webb*, 451 U.S. 493, 501, 69 L.Ed.2d 392, 101 S.Ct. 1889 (1981), '[a]t the minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *federal* Constitution was presented in the state courts and that those courts were appraised of the nature or substance of the federal claim at the time and in the manner required by state law.'

"Even if we were not jurisdictionally barred from considering claims not pressed or passed upon in the state court, as has sometimes been stated . . . , the long standing rule that this Court will not consider such claims creates, at the least, a weighty presumption against review." *Heath v. Alabama*, 474 U.S. 82, 87 (1985).

Like the decision of the Supreme Court of Wisconsin which this Court declined to review in *Northern Pac.R. Co. v. Ellis*, 144 U.S. 458, 464 (1892), the decision of the Supreme Court of Alabama "rested upon an independent ground, not involving a federal question, and broad enough to maintain the judgment." "The judgment before us was rendered in accordance with well-settled principles of general law, not involving any federal question, . . . " *Id.* at 465.

In order for this Court to have jurisdiction to review the judgment of a state court, "it must appear affirmatively, not only that a federal question was raised and presented for decision to the highest court of the state having jurisdiction, but that it was decided, or that its decision was necessary to the judgment that was rendered." *Adams Co. v. Burlington & M.R.R.Co.*, 112 U.S. 123, 127 (1884). *See Eustis v. Boller*, 150 U.S. 361 (1893). In this

case, no federal question was raised or timely presented for decision in the state courts, no federal question was decided, and resolution of a federal question was not necessary to the decision below.

"It is admitted that the general and wellsettled rule is that in a case coming from a state court this Court can consider only Federal questions, and that it cannot entertain the case unless the decision was against the plaintiff in error upon those questions." *Leathe v. Thomas*, 207 U.S. 93, 98 (1907). "It is admitted further, that a decision upon those questions must have been necessary to the decision of the case, so that, if the judgment complained of is supported also upon other and independent grounds, the judgment must be affirmed or the writ of error dismissed, as the case may be." *Id.*

Mr. Biles moved for summary judgment on the grounds of the state law rule of collateral estoppel. Sullivan argued that under Alabama law, in Sullivan's view, the fact findings of Judge Partin in the Baldwin County action should not be given preclusive effect in the Mobile County action. The trial court erroneously denied Mr. Biles' summary judgment motion, Biles appealed, and Biles argued on appeal that collateral estoppel should have been applied. The Supreme Court of Alabama correctly applied Alabama principles of collateral estoppel and held that summary judgment should have been granted. This is the only issue that was decided in the Alabama Courts. At no time prior to the August 11, 2000, decision of the Alabama Court did Sullivan assert that application of collateral estoppel would violate due process of law. Since the only issues actually presented and

litigated in the courts below are questions of state substantive law, this Court should decline to grant certiorari even if the Alabama Court erroneously interpreted or applied Alabama law of collateral estoppel.

"Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground." *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Id.* at 1041. "The principle that we will not review judgments of state courts that rest on adequate and independent state grounds is based, in part, on 'the limitations of our own jurisdiction.' " *Id.* at 1041-1042.

The decision of the Supreme Court of Alabama is clearly based on state law grounds. The only question decided by the Alabama Court was whether, under Alabama law, the fact findings of the trial court in the Baldwin County action contained in its May 9, 1994, order should be given preclusive effect in the Mobile County action. No federal issue is even mentioned in the August 11, 2000, decision. This Court should not undertake to review because the Supreme Court of Alabama's opinion clearly states the separate, adequate, and independent state law grounds for decision. In fact, no federal constitutional issue Sullivan now purports to advance had even been raised in the Alabama courts at that time. It cannot be argued that the non-federal ground was a device to

prevent review of the federal question when the alleged federal question had not even been raised.

The only issue decided was whether, under the unique facts and circumstances of this case, certain factual findings of a trial court ruling on a Rule 60(b) motion can preclude, by application of the Alabama law of collateral estoppel, relitigation of the same fact issue in another trail court. The trial court in the Baldwin County action specifically undertook to determine whether there was a concealment or other attorney misconduct (fraud) in the court proceedings before it and, after considering all the evidence gathered and the arguments of counsel, determined there was no concealment or attorney misconduct. Respondent Biles submitted at least eighteen pages of argument and authority to the Supreme Court of Alabama on this question of Alabama substantive law, including extensive discussion of the authorities governing when, such as in this instant matter, a person not technically a party to the prior proceeding can be bound by the litigation of fact issues so that estoppel is applied; the authority of an Alabama trial court to impose a variety of sanctions against a party or an attorney for misconduct during proceedings held before that court; the circumstances under which a party or its attorney can be considered a "virtual representative" of another person not a party to the litigation; and even discussion of authority from other jurisdictions expressly holding that factual findings issued in connection with Rule 60(b) motions can, in some circumstances, preclude relitigation of these facts in another trial court.

The authorities relied on by Biles in the Alabama court included the following: authority of an Alabama

trial court to impose sanctions and other punishments including, but not limited to, contempt, the award of attorney's fees, the award of costs, and entry of default, for misconduct during court proceedings, *Iverson v. Expert Tune, Inc.*, 553 So.2d 82 (Ala. 1989), *Cincinnati Insurance Company v. Synergy Gas, Inc.*, 585 So.2d 822 (Ala. 1991), *Capitol Chevrolet, Inc. v. Smedley*, 614 So.2d 439 (Ala. 1993), *City of Birmingham v. Tutwiler Drug Company, Inc.*, 475 So.2d 458 (Ala. 1985), *Ala. Code* § 12-1-7, § 12-1-8, § 12-1-9, § 12-11-30(5); application of collateral estoppel generally, *Constantine v. U.S.F. & G., Inc.*, 545 So.2d 750 (Ala. 1989), *Christian Television Corp. of Alabama v. RCH Broadcasting, Inc.*, 554 So.2d 989 (Ala. 1989); application of collateral estoppel to non-parties, *Owen v. Miller*, 414 So.2d 889 (Ala. 1981), *West v. City of Mobile*, 689 So.2d 14 (Ala. 1997), *Rhodes Mutual Life Insurance Company v. Moore*, 586 So.2d 866 (Ala. 1991), *Century 21 Preferred Properties, Inc. v. Alabama Rural State Commission*, 401 So.2d 764 (Ala. 1981); application of preclusive effect to a person who had a "virtual representative" on an issue decided in the prior proceeding, *Brown v. Brown*, 680 So.2d 321 (Ala.Civ.Ap. 1996), *West v. City of Mobile, supra.*; factual findings on a 60(b) ruling precluding relitigation of the same fact issues in another trial court, *Walden v. Hoke*, 429 S.E.2d 504 (W.Va. 1993). Respondent will not attempt to reargue here the intricacies of Alabama law as applied to the facts of this case and which support the decision. There was substantial Alabama authority in support of giving preclusive effect to the fact findings made by Judge Partin.

This Honorable Court is not at liberty to inquire whether the decision of the Alabama Supreme Court in its application of Alabama substantive law of collateral

estoppel is right or wrong. Sullivan's alleged federal question had not even been raised before the Supreme Court of Alabama, so that it cannot be suggested that the decision of the Alabama Court was a mere device to prevent review of a Federal question. Under these circumstances, the petition must be denied.

## THE ALLEGED ISSUE IS NOT AN IMPORTANT QUESTION OF FEDERAL LAW

Sullivan asserts that the allegedly incorrect application of Alabama law of collateral estoppel somehow deprived Sullivan of due process. Review should be denied because the alleged constitutional question is academic and episodic.

Any decision by the Court on any perceived federal issue would be a purely academic exercise and an advisory opinion. There are at least four other reasons why Mr. Biles was entitled to summary judgment under Alabama substantive law. In other words, if this Court were to grant review and reverse the decision of the Supreme Court of Alabama, the final result in this case would remain the same because summary judgment was due to be granted on numerous state law substantive grounds. Any opinion in this case would be merely an advisory opinion or an academic exercise which would have no effect on the ultimate outcome of this case.

Review should be denied for the additional reason that the decision in this case is extremely fact specific and represents an isolated situation not likely to reoccur with any frequency. Collateral estoppel was applied here in a

very unusual fact situation because of the special and unique circumstances of the case. Certiorari should be granted only "in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, . . . " *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Any federal question that might conceivably arise upon the application of collateral estoppel in this case is of virtually no national importance and is of little significance to anyone beyond the litigants to this particular case.

## CONCLUSION

The petition for writ of certiorari is due to be denied.

Respectfully submitted,

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